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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-722

THE SCHOOL BOARD OF ORANGE COUNTY, FLORIDA,

Petitioner,

—v.—

EVELYN R. ELLIS, *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

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Opinions Below

The order, judgment and opinion of the United States Court of Appeals for the Fifth Circuit is now reported at 465 F.2d 878 (1972).

Questions Presented

1. Whether a school board should be absolved from desegregating for the first time certain all-black or virtually all-black schools in 1973, nineteen years after *Brown* v. *Board of Education* and eleven years after suit was filed by black parents and students seeking an end to the dual,

racially-segregated system administered by that board, based upon a 1964 stipulation agreeing to the construction of such schools where the stipulation envisioned, among other things, the desegregation of the schools in question by the beginning of the 1965-66 academic year.

2. Whether the court of appeals erred in rejecting a finding of the trial court that desegregation of an all-black school was infeasible by means of "cross-busing of the youngest children (grades one through six)" where such children had historically been bused by the board to perpetuate segregation and for purposes unrelated to desegregation.

Argument

On April 6, 1962, black parents and students (hereinafter, "respondents") filed this lawsuit seeking an end to the dual, racially-segregated school system in Orange County, Florida administered by the petitioner, School Board of Orange County.[1] On November 5, 1963, a Special Freeholders' Bond Election resulted in the approval of a $25,000,000 bond issue to fund the construction of certain specifically designated new schools and the renovation of other school facilities in Orange County, Florida. In May, 1964 respondents sought to enjoin the Board from issuing bonds as authorized, asserting that the construction and renovation of schools planned would simply reinforce and perpetuate the dual, segregated system which had not been altered in any significant respect since filing of the desegregation suit two years earlier.

Respondents withdrew their motion to enjoin issuance of bonds pursuant to a stipulation entered into with the

[1] Formerly called, "the Board of Public Instruction of Orange County."

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Board, also in May, 1964, in exchange for the following concessions: first, complete desegregation of the Orange County system would be accomplished from grades 1-12 by 1967-68 according to a "stair-step" desegregation plan;[2] second, under the plan, students would be assigned to the schools nearest their homes, irrespective of race or color; third, new schools would be located and additions to existing facilities carried out without concern for the effect of such actions upon the race or color of the student bodies of such facilities; and fourth, the construction of two new schools on sites accessible to both black and white students would be lifted from the low priority accorded their construction under the bond issue schedule to high priority, over the construction of facilities accessible only to white students given first priority by the bond issue.

Petitioner alleges that four schools—Hungerford, Maxey, Orange Center and Richmond Heights—were built subsequent to and in reliance upon the 1964 stipulation. In fact, however, Richmond Heights had already been constructed at the time the stipulation was entered into, though it did not open for classes until 1965. Moreover, Hungerford Elementary was actually built in 1958, before the stipulation, and later restructured in 1962 and 1965. Hence, the construction of only Orange Center and Maxey Elementaries can be regarded as having any relation at all to the 1964 stipulation. Nevertheless, the histories of all four schools reveal the following facts: first, each was built to relieve overcrowding at old, all-black facilities; second, significant numbers of white students lived in the areas of the old, all-black schools who were transported to more distant all-white schools; third, if transported students

[2] During the school year 1964-65 grades 1, 2 and 7 were to be desegregated; all grades between 1 and 8 were to be desegregated by the 1965-66 school year.

had been sent to these new schools subsequent to their construction, significant numbers of white students would have been enrolled; fourth, no white students attended any of these schools until September, 1970 subsequent to the order of the Fifth Circuit Court of Appeals finding that the Orange County System was still dual with respect to student assignment, *Ellis* v. *Board of Public Instruction of Orange County*, Florida, 423 F.2d 203 (5th Cir., 1970); fifth, by May, 1971, after years of racial assignments by petitioner of white students away from the four schools in question to more distant all-white schools, the number of white students living near Hungerford, Maxey, Orange Center and Richmond Heights had decreased substantially from that present at the time of their construction.

The issue in this case is simpler than the Board would have this Court believe: namely, can petitioner absolve itself from its obligation to desegregate Orange Center and Richmond Heights Elementaries[2] in 1973 based upon a stipulation which, among other things, envisioned the implementation by petitioner of a desegregation plan that would have eradicated the dual system by the 1965-66 academic year, eight years ago? (see N.2, *supra*). Contrary to the Board's assertions, respondents did not stipulate to the construction of Richmond Heights on its present site, since it was built before the stipulation was entered into; respondents did not agree to the construction of Orange Center on its present site with the expectation that it would be all-black, since significant numbers of white students resided near the school. Instead, respondents agreed to the construction of Orange Center based upon petitioner's representation that students would be assigned to schools

[2] Hungerford and Maxey Elementaries were held to be desegregated by the Fifth Circuit, a holding with which respondents did not agree but which they decided not to challenge.

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"without regard to race or color" leading inevitably to the assignment of white students to Orange Center, and for that matter, to Hungerford, Richmond Heights and Maxey.

Petitioner also finds fault with that portion of the Fifth Circuit order requiring desegregation of Eccleston Elementary School. In so holding, that court rejected a finding by the trial court that such desegregation was infeasible since it "would require cross-busing of the youngest school children (grades one through six)". The appellate court's ruling is eminently sound, warranting no review by this Court. Though *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 30 (1971) does suggest that such matters as age of the children and distances may be considered by trial courts in determining the feasibility of desegregation plans requiring busing, it does not stand for the proposition that, as a matter of law, younger children may not be bused; compelling evidence must be presented to the trial court which demonstrates that a proposed busing plan will cause severe hardship to younger children. Despite the requirement of *Swann, supra* (and, in fact, for that matter, of the Federal Rules of Civil Procedure) that the trial court determine the feasibility of a plan based upon evidence, petitioner presented no evidence to establish that cross-busing to desegregate Eccleston would have harmful effects upon young children; quite to the contrary, respondents presented evidence to establish that cross-busing would involve trips to between 3.6 and 4.6 miles and between 11 to 14 minutes travel time—statistics well within those relating to transportation of younger children carried out by the Board in the past for purposes unrelated to desegregation. The trial court's finding of fact was then, in effect, no finding at all but rather, viewed in its best light, mere surmise or conjecture by that court. Certainly

mere incantation of the reference in *Swann, supra*, to "the age of the students" [4] cannot, absent a record, justify a court's finding a desegregation proposal infeasible as was done here. That petitioner disagrees with the Fifth Circuit's refusal to affirm the trial court's finding on Eccleston based upon a bare record should be of no concern to this Court. The Fifth Circuit merely followed the law.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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[4] "An objection to transportation of students may have validity when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the education process. . . . It hardly needs stating that the limits on time of travel will vary with many factors but probably with none more than the age of the students." *Swann, supra* at 30-31.

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